Clarifying Statutory Access to Judicial Review of Agency Action

Committee on Judicial Review

Proposed Recommendation for Committee | April 22, 2021

Judicial review of federal administrative action is governed by numerous statutes,\(^1\) including two general statutes, the Administrative Procedure Act (APA) and the Hobbs Act, and hundreds of agency-specific statutes. The APA’s judicial review provisions govern judicial review of agency action generally and provide default rules that apply in the absence of any more specifically applicable rules.\(^2\) Agency-specific statutes govern judicial review of actions of particular agencies (often, of particular actions of particular agencies) and may provide specifically applicable rules that displace the general provisions of the APA.\(^3\) Certain procedural aspects of judicial review are governed by federal court rules that specify how to file a petition for review, the content of the record on review, and other matters.\(^4\)

The Administrative Conference of the United States undertook an initiative to identify and review all statutory provisions governing judicial review of federal agency rules and adjudicative orders that appear in the United States Code.\(^5\) In the course of this initiative, the Conference observed various ways in which some of these statutes create unnecessary obstacles to judicial review or overly complicate the process of judicial review. The Conference

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1 Judicial review may also be governed by judicially developed doctrines. See generally John F. Duffy, Administrative Common Law in Judicial Review, 77 Tex. L. Rev. 113 (1998).


3 See 5 U.S.C. § 559, which provides that a “[s]ubsequent statute may not be held to supersede or modify . . . chapter 7 [of the APA] . . . except to the extent that it does so expressly.”


recommends eliminating these obstacles and complications in order to promote efficiency and to reduce unnecessary litigation.

This Recommendation is divided into two parts. The first (Recommendations 1–4) provides a set of drafting recommendations for Congress as it writes new specific judicial review statutes. The second (Recommendation 5) recommends the passage of a general judicial review statute (referred to below as “the general statute”) that would cure problems in existing judicial review statutes. The specific topics covered in the Recommendations are listed below.

**Specifying the Time within which to Seek Review**

Judicial review statutes typically specify the time within which a party may seek judicial review. The Conference’s review revealed two problems that some such statutes cause. First, some specific judicial review statutes specify the time limit using an unusual form of words that results in a time period one day shorter than might be expected. In cases involving these statutes, some parties have lost their right to review because they sought review one day late. Such denials of review serve no substantial policy interest. Accordingly, Recommendation 1 provides that Congress, when specifying the time within which to seek judicial review of agency action, should use one of the usual forms of words and avoid the unusual forms. Recommendation 5(a) provides that Congress should include in the recommended general judicial review statute a provision that would add one day to the review period whenever a specific judicial review statute uses one of the unusual forms, thus saving certain cases from dismissal.

The other problem relating to time limits is that some specific judicial review statutes do not clearly specify the event that starts the time within which to seek review. In particular, some specific judicial review statutes provide that the time for seeking review of an agency regulation begins when the regulation is “issued” or “prescribed,” which has led to litigation about exactly what event constitutes the “issu[ance]” of a regulation. Recommendation 2 provides as a general matter that Congress should clearly specify what event starts the time for seeking review of agency action. Recommendation 2 also provides that in drafting specific judicial review statutes providing for review of an agency regulation, Congress should provide that the time for review...
runs from the regulation’s publication in the Federal Register. Recommendation 5(b) provides that Congress should include in the general statute a provision that whenever a time period for seeking judicial review begins with the issuance of a regulation, the time starts when the regulation is published in the Federal Register.

**Specifying the Mechanism by which Review is Sought**

Most specific judicial review statutes provide that review should be sought by filing either a “petition for review” or a “notice of appeal.” The term “petition for review” is more appropriate, as the term “appeal” suggests an appellate court’s review of a decision by a lower court. Recommendation 3 therefore provides that specific judicial review statutes should direct parties to seek review by filing a petition for review. Problems sometimes arise when a party incorrectly titles the document. In most such cases, the reviewing court treats the incorrect form as the correct one, but occasional decisions refuse to save a party who has given the document the wrong name. Parties should not lose their right to review by filing an incorrectly styled document. To cure this problem, while maintaining the preference for “petitions for review,” Recommendation 5(c) provides that Congress should include in the general statute a provision that any specific judicial review statute authorizing parties to initiate judicial review of agency action by filing a notice of appeal shall be construed to authorize the filing of a petition for review, and in any case in which a party initiates review by filing a notice of appeal, the court shall treat the document as a petition for review.

**Specifying the Content of the Document Used to Initiate Review**

Most specific judicial review statutes do not prescribe the content of the document used to initiate review. This salutary practice allows the content of the document to be determined by rules of court, such as Federal Rule of Appellate Procedure 15, which contains only minimal requirements. A few unusual specific judicial review statutes prescribe the content of the petition for review in more detail. These requirements unnecessarily complicate judicial review. Recommendation 4 provides that Congress should understand that specific judicial review statutes need not specify the required content of a petition for review and Congress may allow...
the content to be governed by the applicable rules of court. Recommendation 5(d) provides that Congress should include in the general statute a provision generally allowing documents initiating judicial review to comply either with an applicable specific judicial review statute or an applicable rule of court.

**Protecting Against Potential Problems**

The Conference’s review uncovered two other potential difficulties that some specific judicial review statutes might cause. One is that some specific judicial review statutes provide that parties should seek review of agency action in federal courts of appeals but do not specify that these courts shall have jurisdiction to hear the resulting cases. In such a case, a court of appeals might question whether it has jurisdiction to consider the petition for review. The other potential problem is that some specific judicial review statutes provide that the party seeking judicial review of agency action shall transmit the document initiating review to the agency “simultaneously” with filing the document. Such a provision could cause a court to question what should happen if a party seeking review serves the document initiating review on the agency, but not “simultaneously” with filing the document. Although the Conference’s review has found no cases dismissed because of these issues, in these days when courts pay closer attention to statutory text, a court might dismiss a petition for review based on these potential problems. Accordingly, Recommendation 5(e) provides that Congress should include in the general statute a provision that whenever a specific judicial review statute authorizes a party to seek judicial review of agency action in a specified court, the court shall have jurisdiction to consider the resulting case. Recommendation 5(f) provides that whenever a specific judicial review statute requires a party seeking judicial review to serve a copy of the document initiating review on the agency involved “simultaneously” with filing it, the service requirement shall be deemed satisfied if the document is served on the agency within a specified number of days.

**Race to the Courthouse, Revisited**

The Conference’s Recommendation 80-5 addressed the “race to the courthouse” problem that arises when multiple parties seek judicial review of the same agency action in different.
circuits. In accordance with that recommendation, Congress provided by statute that in such cases a lottery shall determine which circuit shall review the agency’s action. The statute, however, provides that the lottery system applies only when an agency receives multiple petitions for review “from the persons instituting the proceedings.” This provision has been held not to apply to petitions for review forwarded to an agency by a court clerk, as some specific judicial review statutes require. Parties invoking judicial review under such specific judicial review statutes should be entitled to the benefit of the lottery system. Recommendation 5(g) provides that Congress should amend the “race to the courthouse” statute appropriately.

RECOMMENDATION

[General Drafting Recommendations to Congress]

1. When specifying the time within which a party may seek judicial review of agency action, Congress should provide that a party may seek review “within” or “not later than” a specified number of days after an agency action. Congress should avoid providing that a party may seek review “prior to” or “before” the day that is a specified number of days after an agency action, or “within” or “before the expiration of” a period of a specified

number of days beginning on the date of an agency’s action. Examples of the
recommended forms are:

a. “A party desiring judicial review may file a petition for review within 30
days after” the agency’s action.

b. “A party desiring judicial review may file a petition for review not later than 30
days after” the agency’s action.

Examples of the forms to be avoided are:

c. “A party desiring judicial review may file a petition for review prior to [or
“before”] the 30th day after” the agency’s action.

d. “A party desiring judicial review may file a petition for review within [or “before
the expiration of”] the 30-day period beginning on the date of” the agency’s
action.

2. Congress should clearly specify what event starts the time for seeking review. Where the
event is the [issuance/adoption/promulgation [or amendment/repeal] of a rule, Congress
should provide that the time starts from the publication date for the regulation in the
printed version of the Federal Register, that date being the latest date appearing on the
issue/pages of the Federal Register in/on which the regulation appears.\[1\]

3. When drafting a specific judicial review statute, Congress should provide that review
should be initiated by filing a “petition for review.”

4. When providing that a party may seek judicial review, Congress [should be aware that it
need not/]should not specify the required content of the petition for review, complaint, or
other document initiating judicial proceedings [because that matter would be governed
by/]but should instead allow that matter to be governed by [the applicable court rules/the
rules of the court in which judicial review is sought].

General Judicial Review Statute

5. Congress should enact a new general judicial review statute that includes these
provisions:

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Commented [ACU55]: Staff Comment: Bracketed language from April 1 committee meeting
preserved for further discussion. This occurs in Recommendations 2, 4, and 5(f).

Commented [ACU56]: Staff Inquiries: Should we include a draft bill as an appendix?
Do we anticipate a new provision in or amendment to Title 5, Title 28, or elsewhere?
Are any definitions or additional guidance needed? (for example, “general judicial review statute”, “agency action”,
“notice of appeal”)
Is “agency action” too broad/vague?
a. Whenever a specific judicial review statute provides that a party may seek judicial
review of an agency’s action “prior to” or “before” the day that is a specified
number of days after an agency’s action, or “within” or “before the expiration of”
a period of a specific number of days beginning on the date of an agency’s action,
review may also be sought exactly that number of days after the agency’s action.
b. Whenever a specific judicial review statute provides that the event that starts the
time for seeking judicial review is the promulgation of a regulation, the time starts
from the date the regulation is published in the Federal Register.
c. Statutes authorizing judicial review by the filing of a “notice of appeal” shall be
construed as authorizing judicial review by the filing of a petition for review, and
whenever a party seeking judicial review styles the document initiating review as
a “notice of appeal,” the court shall treat that document as a petition for review.
d. Whenever a specific judicial review statute specifies the required content of a
document that initiates judicial review, a party may initiate review with a
document that complies with the requirements of that statute or a document that
complies with the applicable rules of court.
e. Whenever a specific judicial review statute provides that a party may seek judicial
review of an agency action in a specified federal court, the specified federal court
shall have jurisdiction to hear the resulting case.
f. Whenever a specific judicial review statute requires that a party seeking review
serve the document initiating review on the agency that issued the order of which
review is sought “simultaneously” with filing the document, this requirement is
satisfied if the document is served on the agency within a reasonable but specific
number of days, such as [seven/fourteen] days.

Commented [ACU57]: Staff Inquiry:
Should the variation in the language used in the first half and
the second half of the recommendation be revised to be consistent/identical?
Recommendation 5(g): Struck-Through Text of § 2112(a)(1) for Clarity:

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the [a] petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the [a] petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

Commented [ACUS8]: Staff Comment: For Recommendation 5(g), this struck-through text is provided for clarity and convenience. This struck-through text is not included in line numbering and will not appear in the final recommendation.